

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

KELLI GRAY and all others
similarly situated,

Plaintiffs,

v.

SUTTELL & ASSOCIATES; MIDLAND
FUNDING, LLC; MARK T. CASE and
JANE DOE CASE, husband and wife;
and KAREN HAMMER and JOHN DOE
HAMMER,

Defendants.

NO. CV-09-251-EFS

**ORDER ENTERING RULINGS FROM
MARCH 23, 2011 HEARING**

EVA LAUBER, DANE SCOTT, SCOTT
BOOLEN, JOEL FINCH, and all
others similarly situated,

Plaintiffs,

v.

ENCORE CAPITAL GROUP, INC.;
MIDLAND FUNDING, LLC; MIDLAND
CREDIT MANAGEMENT, INC.; SUTTELL
& HAMMER, PS.; MARK T. CASE and
JANE DOE CASE, husband and wife;
MALISA L. GURULE and JOHN DOE
GURULE; KAREN HAMMER and ISAAC
HAMMER, wife and husband;
WILLIAM SUTTELL and JANE DOE
SUTTELL, husband and wife;

Defendants.

A hearing occurred in the above-captioned matter on March 23, 2011.
Plaintiffs were represented by Michael Kinkley, Kirk Miller, and Scott

1 Kinkley. Carl Hueber appeared on behalf of the *Gray-Suttell* Defendants;¹
2 Bradley Fisher appeared on behalf of the *Lauber-Suttell* Defendants;² John
3 D. Munding and Amy Gallegos appeared on behalf of Defendants Midland
4 Funding, LLC, Midland Credit Management, Inc., and Encore Capital Group,
5 Inc. ("Encore Defendants"). Before the Court were several motions filed
6 by the parties. After reviewing the submitted materials and relevant
7 authority and hearing from the parties, the Court was fully informed.
8 This Order memorializes and supplements the Court's oral rulings.

9 I. BACKGROUND

10 A. *Gray*

11 Plaintiff Kelli Gray ordered an item from Spiegel Brands, Inc.
12 ("Spiegel") mail-order catalogue and did not pay. On December 4, 2007,
13 Midland Funding, LLC ("Midland"), a debt-buying business, purchased Ms.
14 Gray's defaulted Spiegel account. Midland assigned the account to its
15 servicer, Midland Credit Management Inc. ("MCMC"), which determines
16 whether certain accounts are "eligible" or "not eligible" for collection,
17 then turned the account over to a collection agency to collect the debt.
18 The *Gray-Suttell* Defendants filed a lawsuit against Ms. Gray in Spokane
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20

21 ¹ The *Gray-Suttell* Defendants refer to the Suttell Defendants named
22 in the *Gray* action: Suttell & Associates, Mark T. Case, Jane Doe Case,
23 Karen Hammer, and John Doe Hammer.

24 ² The *Lauber-Suttell* Defendants refer to the Suttell Defendants
25 named in the *Lauber* action: Suttell & Hammer, P.S., Mark T. Case, Jane
26 Doe Case, Malisa L. Gurule, John Doe Gurule, Karen Hammer, Isaac Hammer,
William Suttell, and Jane Doe Suttell.

1 County Superior Court under the name *Midland Funding LLC v. Gray*, Case
2 No. 08-2-04860, to collect the debt.

3 The Complaint ("Gray") was filed on August 12, 2009, alleging
4 violations of the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C.
5 § 1692, *et seq.*; Washington Consumer Protection Act (WCPA), RCW 19.86,
6 *et seq.*; and Washington Collection Agency Act (WCAA), RCW 19.16.

7 Ms. Gray alleges the Defendants violated those statutes by 1)
8 serving and filing time-barred lawsuits ("Statute of Limitations Claim");
9 2) requesting unreasonable attorneys' fees of \$650.00 in a default
10 judgment and \$850.00 in a summary judgment ("Attorney Fee Claim"); and
11 3) acting as a collection agency without a collection-agency license
12 ("Licensing Claim").

13 On July 12, 2010, Ms. Gray moved to certify three related classes
14 (ECF No. 28):

15 1) Statute of Limitations³ (based on UCC 2-725 "transaction in
16 goods" four-year statute of limitations) consisting of:

- 17 a) all persons with addresses who were threatened
with a lawsuit, or who were sued in the state of
Washington;
- 18 b) on a Spiegel or Eddy [sic] Bauer account more
than four years from the date the account became in
default.

19 2) Attorney Fee Class⁴ consisting of:

21 ³ This class is further divided into a FDCPA Statute of Limitations
22 Subclass (debt for household purposes; one-year statute of limitations),
23 and a WCAA Statute of Limitations Subclass (debt not necessarily for
24 household purposes; four-year statute of limitations).

25 ⁴ This class is further divided into a FDCPA Attorney Fee Subclass
26 (debt for household purposes; one-year statute of limitations), and a
WCAA/WCPA Attorney Fee Subclass (debt not necessarily for household

1 a) all persons with addresses who were sued in the
state of Washington;

2 b) from whom Defendants Suttell & Associates, P.S.
and/or Mark T. Case and/or Karen Hammer, and/or
3 Midland Funding, LLC demanded an attorney fee of
\$650.00 as part of a motion for default judgment or
4 demanded an attorney fee of \$850.00 as part of a
motion for summary judgment.

5 3) License Class (based on WCAA/WCPA violations) consisting of:

6 a) all persons with addresses from whom Midland
Funding LLC individually (or through a
7 representative including but not limited to Suttell)
attempted to collect or who were sued in the state
8 of Washington for a "Claim" defined as "any
obligation for the payment of money or thing or
9 value arising out of any agreement or contract,
express or implied" (RCW 19.16.100(5) that was in
10 default at the time Midland Funding LLC obtained any
right to the claim.

11 b) who paid any sum of money;

12 c) the class period for this WCAA/WCPA subclass is
from four years prior to the date of filing this
action to the present.

13 Also on July 12, 2010, the Gray-Suttell Defendants filed a Motion
14 for Partial Summary Judgment Re: Applicable Statute of Limitations (ECF
15 No. 32). And on July 21, 2010, they filed a Motion for Summary Judgment
16 Re: Attorney Fees (ECF No. 44). These motions were continued several
17 times so the parties could conduct further discovery. They are still
18 pending and have not been revised or supplemented with discovery.

19 **B. *Lauber***⁵

20 Plaintiffs Eva Lauber, Dane Scott, Scott Boolen, and Joel Finch
21 (collectively, "*Lauber Plaintiffs*"), like Ms. Gray, were obligated to pay
22 a debt and failed to do so. They filed a Complaint ("*Lauber*") on
23 November 10, 2010, alleging violations of the FDCPA, WCPA, and WCAA,
24 _____
25 purposes; four-year statute of limitations).

26 ⁵ *Lauber et. al. v. Encore Capitol Group, Inc., et. al.*, Case No.
CV-10-5132.

1 based on: 1) filing unfair, deceptive, and misleading "Form 400" and
2 "AFFRECORD" affidavits in support of default and summary-judgment motions
3 ("Affidavit Claim"); and 2) acting as a collection agency without a
4 collection agency license ("Licensing Claim").

5 In addition to those defendants named in *Gray*, the *Lauber* Plaintiffs
6 also named Encore Capital Group, Inc. ("Encore"), which purchases and
7 manages charged-off consumer portfolios, and MCMI, Midland Funding's
8 servicer, as defendants.

9 **C. Consolidation and Encore's Motion to Dismiss**

10 On November 19, 2010, Plaintiffs sought to consolidate *Gray* with
11 *Lauber*, maintaining that the two complaints complete one another: Ms.
12 *Gray* allegedly suffered an Affidavit violation and the *Lauber* Plaintiffs
13 suffered Attorney Fee and Statute of Limitations violations. On December
14 29, 2010, the Court granted Ms. *Gray*'s motion to consolidate, requiring
15 that all future filings be filed under the CV-09-251 case number.

16 On February 15, 2011, Plaintiffs filed a new motion for class
17 certification to incorporate the Affidavit Claim within the class
18 definition. (ECF No. 229.) And on January 24, 2011, Defendants Encore,
19 Midland, and MCMI (collectively "Encore Defendants"), filed a Motion to
20 Dismiss (ECF No. 195) the WCPA claims in the *Lauber* Complaint, arguing
21 that Plaintiffs did not sufficiently plead their WCPA claims to include
22 injury "to business or property."

23 Apparently to cure this defect, Plaintiffs filed two motions on
24 February 14, 2011: First, to allow Ruby J. Marcy and Marla J. Herbert
25 to intervene in this action (ECF No. 220); and second, to amend the
26 *Lauber* Complaint (ECF No. 223) to: 1) add that the Defendants collected
money from Dane Scott by wage garnishments (which rebuts the Encore

1 Defendants' motion to dismiss that there was a lack of injury to
2 property); 2) add Ms. Marcy and Marla J. Herbert as Plaintiffs (because
3 they allegedly suffered the same Affidavit and Attorney Fee violations
4 and the Defendants collected money from them by garnishment); 3) clarify
5 which claims Plaintiffs allege relate back or are tolled; 4) clarify that
6 Ms. Gray also asserts an Affidavit Claim; 5) clarify that the *Lauber*
7 Plaintiffs also assert an Attorney Fee Claim; and 6) amend and simplify
8 the class definition.

9 **D. Recent Developments**

10 A status conference was held February 16, 2011, to discuss the
11 consolidated case. At the hearing, the Encore Defendants' counsel
12 advised that the Affidavit Claim against the Encore Defendants was about
13 to be settled on a nationwide basis in *Midland Funding, LLC v. Brent*, No.
14 3:08-CV-1434-DAK (N.D. Ohio) ("*Brent*").

15 On March 11, 2011, the District Court in the Northern District of
16 Ohio approved, executed, and preliminarily approved a nationwide
17 settlement⁶ of the following class:

18 All natural persons (a) sued in the name of Encore Capital
19 Group, Inc., Midland Funding, LLC, Midland Credit Management,
20 Inc., or any other Encore and/or Midland-related entity
21 (collectively, Midland), (b) between January 1, 2005, and the
22 date the Order of Preliminary Approval of Class Action
Settlement is entered by the Court, (c) in any debt collection
lawsuit in any court (d) where an affidavit attesting to facts
about the underlying debt was used by Midland in connection
with the debt collection lawsuit.

23 (ECF No. 272.)
24
25

26 ⁶ That court preliminarily approved a \$5.2 million settlement, in
which the maximum payment to each class member is capped at \$10.00.

1 A preliminary injunction ("*Brent* Injunction") was also issued,
 2 enjoining Plaintiffs from continuing to litigate their Affidavit Claims
 3 in this Court. It enjoins "all Class Members and all persons with actual
 4 notice of [the] Order" from:

5 participating as class members in any lawsuit in any forum, or
 6 otherwise filing, intervening in, commencing, prosecuting,
 7 continuing and/or litigating any lawsuit in any forum arising
 8 out of or relating to the use of affidavits in debt collection
 9 lawsuits by Encore Capital Group, Inc., and/or its subsidiaries
 10 and affiliates, including but not limited to Midland Credit
 Management, Inc., Midland Funding LLC, MRC Receivables Corp.,
 and Midland Funding NCC-2 Corp., unless and until such time as
 the Class member involved in such action timely and validly
 excludes himself or herself from the class to pursue individual
 relief.

11 (ECF No. 272-3.)

12 **E. Second Supplemental Motion for Class Certification**

13 To avoid violating the *Brent* Injunction, Plaintiffs filed a Second
 14 Supplemental Motion for Class Certification (ECF No. 276) on March 16,
 15 2011, asking the Court to approve a class based on the the July 2010
 16 class definition. Accordingly, Plaintiffs seek an order certifying a
 17 (approximately 8,000-member) class defined as:

- 18 1) all natural persons;
- 19 2) who were defendants in a lawsuit filed in a court in
 Washington state;
- 20 3) in which Midland Funding, LLC or Midland Credit Management
 or any entity owned by Encore was the Plaintiff;
- 21 4) in which Midland Funding LLC or Midland Credit Management
 or any entity owned by Encore was represented by Suttell &
 Associates, P.S. or Suttell & Hammer, P.S.;
- 22 5) in which a Suttell declaration for reasonable attorney fees
 of \$650.00 in connection with a Motion for Default Judgment or
 23 for \$650.00 in connection with a Motion for Default Judgment
 or for \$850.00 in connection with a Motion for Summary Judgment
 24 was filed or served; and
- 25 6) FDCPA subclass⁷: the request was filed on or after August
 12, 2008, (the date one (1) year period prior to commencement

⁷ WCAA and WCPA would also apply to this subclass.

of this action, 15 U.S.C. 1692k(d)) for the FDCPA sub-class;
or

7) WCPA/WCAA subclass⁸: the declaration was filed on or after August 12, 2005, (the date four years before this action was commenced, RCW 19.18.120) for the WCPA/WCAA subclass.

Due to its late filing, Defendants were unable to fully respond to Plaintiffs' Second Supplemental Motion for Class Certification (ECF No. 276).

F. Discovery

A Second Motion to Compel Production of Documents (ECF No. 216) from the Gray-Suttell Defendants, filed February 11, 2011, is currently pending. The Court has granted several previous motions to compel filed by Plaintiffs. (ECF No. 205.) Trial is set for February 21, 2012.

II. DISCUSSION

As an initial matter, the Court considers the *Brent* Injunction's effect on the pending motions. The *Brent* Injunction prohibits individuals from:

participating as class members in any lawsuit in any forum, or otherwise filing, intervening in, commencing, prosecuting, continuing and/or litigating any lawsuit in any forum arising out of or relating to the use of affidavits in debt collection lawsuits by Encore Capital Group, Inc., and/or its subsidiaries and affiliates, including but not limited to Midland Credit Management, Inc., Midland Funding LLC, MRC Receivables Corp., and Midland Funding NCC-2 Corp., unless and until such time as the Class member involved in such action timely and validly excludes himself or herself from the class to pursue individual relief.

(ECF No. 272-3.)

Since the *Brent* Injunction only prohibits action on lawsuits arising out of the Encore Defendants' "use of affidavits in debt collection," the

⁸ This subclass would not share in distribution of the FDCPA statutory damages without equitable tolling.

1 parties agree that the pre-consolidation Gray claims still remain because
2 they are not based on Encore's allegedly false affidavits. The Court
3 agrees: although Plaintiffs may not advance their Affidavit Claims
4 against any Encore Defendants, they may pursue: 1) Attorney Fees,
5 Licensing, and Statute of Limitations Claims against Suttell and Encore
6 Defendants, and 2) Affidavit Claims against Suttell. With this
7 conclusion in mind, the Court considers each motion.

8 **A. Plaintiffs' Motion to Amend/Correct the Complaint**

9 Plaintiffs move for leave to amend the *Lauber* Complaint to: 1) add
10 that Defendants collected money from Mr. Scott by wage garnishments; 2)
11 add Ms. Marcy and Ms. Herbert as Plaintiffs; 3) clarify a) which claims
12 relate back or are tolled, b) that Ms. Gray also asserts an Affidavit
13 Claim, and c) that the *Lauber* Plaintiffs also assert an Attorney Fee
14 Claim; and 4) amend and simplify the class definition. All Defendants
15 agree that Plaintiffs are entitled to amend their Complaint as a matter
16 of right and thus do not oppose the motion.

17 Under Federal Rule of Civil Procedure 15(a)(1)(B), a party may
18 amend its pleading once as a matter of right within twenty-one days after
19 service of a motion under Rule 12(b). Here, the Encore Defendants filed
20 a Rule 12(b)(6) motion to dismiss for failure to state a claim on January
21 24, 2011. Plaintiffs filed the instant motion on February 14, 2011.
22 Because Plaintiffs may amend their Complaint once as a matter of right,
23 **NO LATER THAN April 8, 2011,**⁹ Plaintiffs may re-plead and re-file an
24 amended complaint as set forth above, so long as it avoids the *Brent*

25
26 ⁹ Plaintiffs filed an Amended Complaint on April 8, 2011. (ECF No.
[297.](#))

1 Injunction (i.e., does not advance Plaintiffs' Affidavit Claim against
2 any *Encore* Defendants in any way). Accordingly, Plaintiffs' motion to
3 amend is **GRANTED** and **DENIED IN PART WITH RIGHT TO RE-FILE**.

4 **B. Encore Defendants' Motion to Dismiss**

5 The Encore Defendants move to dismiss Plaintiffs' WCPA claim (which
6 is based on WCAA violations) for failure to state a claim because
7 Plaintiffs failed to assert facts demonstrating they suffered injury to
8 "business or property" as required by the WCAA.

9 The *Lauber* Plaintiffs allege they are entitled to treble damages
10 (and injunctive and declaratory relief) pursuant to the WCPA because
11 Defendants violated the WCAA (a per se violation of the WCPA), when they:
12 1) failed to obtain proper licenses; 2) filed lawsuits without being a
13 Washington corporation or qualified foreign corporation; 3) failed to
14 give certain statutorily-required notices in debt-collection
15 communications; and 4) misrepresented amounts due and attempted to
16 collect amounts in excess of those allowed by law. (ECF No. 145-1, ¶
17 12.1-12.12). Three of the four named *Lauber* Plaintiffs claim no injury
18 arising from these violations. Only Ms. Lauber claims she suffered an
19 injury, and that was for "mileage to court to file pleadings, attend the
20 January 15, 2010 and August 18, 2010 hearings, used vacation time for
21 time off work to attend hearings, postage, and cell phone time." *Id.* ¶
22 13.2).

23 Because Plaintiffs are given leave to amend their Complaint to cure
24 the defects identified by the Encore Defendants' motion to dismiss (but
25 only to the extent that it does not contravene the *Brent* Injunction), the
26 Court **DENIES WITH LEAVE TO RENEW** the Encore Defendant's Motion to Dismiss

1 (ECF No. 195). The Encore Defendants may move to dismiss the WCPA claims
2 after Plaintiffs file an amended complaint.

3 **C. Ruby J. Marcy and Marla J. Herbert's Motion to Intervene**

4 Ms. Marcy and Ms. Herbert seek to intervene as a matter of right in
5 this action as plaintiffs and putative class representatives, purportedly
6 to save the WCPA claims if they are dismissed. All Defendants oppose the
7 motion.

8 Under Federal Rule of Civil Procedure 24(a), the Court must permit
9 a person to intervene if she establishes three elements: 1) she has an
10 interest in the subject matter of the pending litigation; 2) there is a
11 substantial risk that the litigation will impair the interest; and 3) the
12 existing parties do not adequately protect that interest. Fed. R. Civ.
13 P. 24(a)(2); *Arakaki v. Cayetano*, 324 F.3d 1078, 1088 (9th Cir. 2003),
14 *cert. denied*, *Hoohuli v. Lingle*, 540 U.S. 1017 (2003) ("Intervention is
15 improper . . . because [intervenor's] interests are adequately
16 represented by existing parties.").

17 Ms. Marcy and Ms. Herbert suffered the same violations as the
18 existing Plaintiffs: each had a default judgment entered against her
19 that was based on an allegedly false affidavit (Affidavit Claim), was
20 assessed a \$650.00 attorney fee by Suttell (Attorney Fee Claim), and had
21 a debt was collected against her without a license (License Claim). As
22 to Ms. Marcy, Defendants allegedly filed a lawsuit to collect a Spiegel
23 debt beyond the statute of limitations (Statute of Limitations Claim).
24 And their addition seeks to cure the defects identified by the Encore
25 Defendants' motion to dismiss: each has suffered injury to property
26 because Defendants allegedly garnished their wages based upon the
allegedly false affidavit (Affidavit Claim) (ECF Nos. 222-6 & 228-1) and

1 Suttell employees' misrepresentations that a \$650.00 fee is reasonable
2 (Attorney Fee Claim) (ECF No. 222-5 & 228-2).

3 Yet it is unclear whether the existing named Plaintiffs adequately
4 represent Ms. Marcy and Ms. Herbert's interests. The Ninth Circuit
5 considers three factors in determining adequacy of representation: 1)
6 whether the interest of a present party is such that the party will
7 undoubtedly raise the same arguments as the intervenor; 2) whether the
8 present party is capable of and willing to make such arguments; and 3)
9 whether the intervenor would offer any necessary elements to the
10 proceedings that the existing parties would neglect. *California v. Tahoe*
11 *Reg'l Planning Agency*, 792 F.2d 775, 778 (9th Cir. 1986). Thus, if any
12 of the named parties may proceed with their WCPA claims, then Ms. Marcy
13 and Ms. Herbert cannot intervene. See Fed. R. Civ. P. 24(a)(2).

14 Here, Plaintiffs raise the valid concern that if the Court grants
15 the Encore Defendants' motion to dismiss (thereby dismissing the WCPA
16 claims), the statute of limitations would be reduced from four years to
17 one year,¹⁰ which would likely impair Ms. Marcy and Ms. Herbert's ability
18 to pursue their claims. But Ms. Herbert and Ms. Marcy's alleged injury
19 - wage garnishment - appears identical to that of already-named Plaintiff
20 Mr. Scott. (ECF No. 232-1, ¶¶ 9.102-9.107; 12.77-12.89; 13.87-13.99.)
21 This suggests that the prospective intervenors' interests would be
22 adequately protected if the amended complaint cured the defects
23 identified by the Encore Defendants' motion to dismiss by setting forth
24 facts establishing injury to Mr. Scott's property.

25
26 ¹⁰ This is because only the FDCPA claims, which carry a one-year
statute of limitations, would remain. See 15 U.S.C. § 1692k(d).

1 The Court has granted Plaintiffs' request to file an amended
2 complaint to assert that Mr. Scott's wages were garnished. This
3 amendment may obviate the need for Ms. Marcy and Ms. Herbert to
4 intervene. Accordingly, the Court **DENIES WITH LEAVE TO RENEW** the motion
5 to intervene.

6 **D. Plaintiffs' Motions for Class Certification**

7 On July 12, 2010, Ms. Gray moved to certify three related classes.
8 (ECF No. 28.) After consolidation, Plaintiffs filed a new motion for
9 class certification to incorporate the Affidavit Claim within the class
10 definition on February 16, 2011. (ECF No. 229.) Then on March 16, 2011,
11 and to avoid violating the *Brent* injunction, Plaintiffs filed a Second
12 Supplemental Motion for Class Certification (ECF No. 276) asking the
13 Court to revert to the July 2010 class definition and approve a class
14 defined as:

- 15 1) all natural persons;
- 16 2) who were defendants in a lawsuit filed in a court in
Washington state;
- 17 3) in which Midland Funding, LLC or Midland Credit Management
or any entity owned by Encore was the Plaintiff;
- 18 4) in which Midland Funding LLC or Midland Credit Management
or any entity owned by Encore was represented by Suttell &
19 Associates, P.S. or Suttell & Hammer, P.S.;
- 20 5) in which a Suttell declaration for reasonable attorney fees
of \$650.00 in connection with a Motion for Default Judgment or
21 for \$650.00 in connection with a Motion for Default Judgment
or for \$850.00 in connection with a Motion for Summary Judgment
was filed or served; and
- 22 6) FDCPA subclass¹¹: the request was filed on or after August
12, 2008, (the date one (1) year period prior to commencement
23 of this action, 15 U.S.C. 1692k(d)) for the FDCPA sub-class;
or

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¹¹ WCAA and WCPA would also apply to this subclass.

1 7) WCPA/WCAA subclass¹²: the declaration was filed on or after
2 August 12, 2005, (the date four years before this action was
commenced, RCW 19.18.120) for the WCPA/WCAA subclass.

3 Defendants ask the Court to continue hearing on all Plaintiffs'
4 motions for class certification. The Court agrees. Ruling on the
5 *Lauber*-based Supplemental Motion to Certify (ECF No. 229), which
6 incorporates the Affidavit Claim into the class definition, would violate
7 the *Brent* injunction. And since Plaintiffs filed their most recent
8 class-certification motion on March 16, 2011, Defendants have had
9 insufficient time to argue the merits of the class-certification motion
10 after consolidation and the *Brent* Injunction.

11 For these reasons and those articulated on the record, the Court
12 **DENIES WITH LEAVE TO RENEW** Plaintiffs' Motion to Certify Class (ECF No.
13 28), Supplemental Motion to Certify Class (ECF No. 229), and Second
14 Supplemental Motion to Certify Class (ECF No. 276).¹³ Plaintiffs may file
15

16 ¹² This subclass would not share in distribution of the FDCPA
17 statutory damages without equitable tolling.

18 ¹³ In addition to their class-certification-continuance request, the
19 Suttell Defendants move for an order striking the Declaration of Dane
20 Scott Regarding Adequacy to Act as Class Representative (ECF No. 264),
21 because 1) the parties have had insufficient time to conduct discovery
22 from Mr. Scott; and 2) it was not filed more than thirty (30) days before
23 the hearing, LR 7.1(d)(1), (h)(2)(a). Consistent with the Court's
24 rulings on the class-certification motions, the Court **DENIES AS MOOT**
25 (strike declaration) and **GRANTS** (continue hearing) **IN PART** Suttell
26 Defendants' Motion to Strike Declaration of Dane Scott and to Continue
ORDER * 14

1 a motion for class certification after April 8, 2011, once the amended
2 complaint is filed.

3 **E. Gray-Suttell Defendants' Motions for Summary Judgment**

4 By separate motions filed in July 2010, the Gray-Suttell Defendants
5 move for summary judgment, requesting the Court find as a matter of law
6 that: 1) the six-year statute of limitations under RCW 4.16.040(1) (for
7 transactions involving third-party bank creditors), applies to this
8 matter and excuses it from UCC § 2-725's four-year limitation period (for
9 the simple sale of goods); and 2) that the \$650.00 fee request for
10 pursuing a collection to default judgment is reasonable and thus, is not
11 a violation of the FDCPA or Washington law. Ms. Gray opposes both
12 motions. She also moves to strike the documents supporting the summary-
13 judgment motion on the Statute of Limitations Claim (ECF No. 60), arguing
14 that they contain inadmissible hearsay. No replies were filed.

15 Because these motions were filed in July 2011, continued several
16 times so the parties could conduct further discovery, and not revised or
17 supplemented to reflect any discovery undertaken since then, the Gray-
18 Suttell Defendants' Motion for SJ Re: Attorney's Fees (ECF No. 44),
19 Motion for Partial SJ Re: Statute of Limitations (ECF No. 32), and
20

Hearing on Motions for Class Certification (ECF No. 266). The Court may
21 consider the Dane Scott Declaration if necessary at a later date.
22

23 Plaintiffs also move to strike certain hearsay statements (ECF No.
24 256) regarding the nationwide settlement and injunction in Brent because
25 no such settlement agreement or injunction had been filed at the time.
26 Because the *Brent* Settlement Agreement and Injunction have been filed,
is **DENIED AS MOOT**.

1 Plaintiff's Motion to Strike "Exhibit 'A'" Attached to the Suttell
2 Defendants' Memorandum Regarding Applicable Statute of Limitations (ECF
3 No. 60) are **DENIED WITH LEAVE TO RENEW. NO LATER THAN April 29, 2011,**
4 the parties shall meet and confer and file a notice with the Court
5 setting forth a hearing date and briefing schedule for any anticipated
6 motions for summary judgment.

7 G. Second Motion to Compel Production of Documents from Defendant
8 Suttell

9 Plaintiffs ask the Court to require the Gray-Suttell Defendants to
10 produce outstanding discovery relating to their internal computer notes
11 maintained as the attorney "file" for each case ("JST Notes").
12 Specifically, Plaintiffs seek: 1) JST notes related to the Attorney Fee
13 Claim (Requests for Production 38, 39, 40); 2) JST notes related to
14 Spiegel Statute of Limitations Claim (RFP 41); and 3) detailed
15 declarations of attorneys fees filed by the Suttell Defendants in
16 Washington courts, information related to the previously-requested
17 "historical analysis" (Interrogatory 13, RFP 7 & 23). The Gray-Suttell
18 Defendants argue that this motion should be denied because, in light of
19 the pending motions filed back in July, this effort could be rendered
20 unnecessary based on the rulings, it requires disclosure of private
21 information, and seeks irrelevant information.

22 The Gray-Suttell Defendants correctly maintain that the JST Notes
23 do not memorialize either the time spent or total work performed on a
24 certain task. Plaintiffs, on the other hand, believe the JST Notes are
25 relevant because they can be used to extrapolate the amount of time an
26 employee spent performing a certain task by examining the time difference
between tasks performed. The JST Notes are not contemporaneous

1 timekeeping records. Nor do they reflect the total amount of time an
2 employee has worked on a particular case. Rather, the JST Notes are
3 computer-generated reports that track the time at which a Suttell
4 employee performed a certain task. In some cases, the time entries
5 between tasks performed is mere minutes; from this, one could infer that
6 the time spent performing that particular task could not have exceeded
7 that short time-frame. Yet in other cases, no such inferences may be
8 made because the time between tasks exceeds eight hours.

9 The Suttell Defendants represent that they did not maintain any
10 contemporaneous timekeeping records. As such, any fee was based on a
11 "historical analysis," which has been lost over time. Thus, the Court
12 finds the JST Notes, although perhaps minimally helpful, are relevant to
13 the question of whether the Gray-Suttell Defendants' customary fee was
14 reasonable for the tasks performed. Accordingly, Plaintiff's Second
15 Motion to Compel Production of Documents from Defendant Suttell & Hammer
16 (Interrog. 13, RFP 7, 23, & 38-41) (ECF No. 216) is **GRANTED**: the Gray-
17 Suttell Defendants shall produce 1) JST notes related to the Attorney Fee
18 Claim (RP 38, 39, 40); 2) JST notes related to Spiegel Statute of
19 Limitations Claim (RP 41); and 3) detailed declarations of attorneys fees
20 filed by Suttell Defendants in Washington Courts, information related to
21 the previously-requested "historical analysis" (Interrogatory 13, RP 7,
22 RP 23).

23 III. CONCLUSION

24 For the reasons set forth above and on the record, **IT IS HEREBY**
25 **ORDERED**:

26 1. Plaintiff's Motion to Amend/Correct Complaint (**ECF No. [223](#)**) is
GRANTED and **DENIED IN PART**. **NO LATER THAN April 8, 2011**, Plaintiffs may

1 re-plead and re-file an amended complaint as set forth above, so long as
2 it avoids the *Brent* Injunction (i.e., does not advance Plaintiffs'
3 Affidavit Claim against any *Encore* Defendants in any way).

4 2. Encore Defendants' Motion to Dismiss (**ECF No. [195](#)**) is **DENIED**
5 **WITH LEAVE TO RENEW**. The Encore Defendants may move to dismiss the WCPA
6 claims after Plaintiffs file an amended complaint.

7 3. Ruby J. Macy and Marla J. Herbert's Motion to Intervene (**ECF No.**
8 **[220](#)**) is **DENIED WITH LEAVE TO RENEW**.

9 4. Plaintiffs' Motion to Certify Class (**ECF No. [28](#)**), Supplemental
10 Motion to Certify Class (**ECF No. [229](#)**), and Second Supplemental Motion to
11 Certify Class (**ECF No. [276](#)**) are **DENIED WITH LEAVE TO RENEW** after April
12 8, 2011.

13 5. Suttell Defendants' M. to Strike and Continue Hearing (**ECF No.**
14 **[266](#)**) is **GRANTED** (continue hearing) and **DENIED AS MOOT** (strike) **IN PART**.

15 6. Plaintiffs' Motion to Strike Portions of the Midland Defendants'
16 Memorandum in Opposition to Plaintiff's "Supplemental Motion for Class
17 Certification" (**ECF No. [256](#)**) is **DENIED AS MOOT**.

18 7. The Gray-Suttell Defendants' Motion for Partial SJ Re: SOL (**ECF**
19 **No. [32](#)**) and Motion for SJ Re: Attorney's Fees (**ECF No. [44](#)**), and
20 Plaintiffs' Motion to Strike [34] Memorandum in Support of Motion (**ECF**
21 **No. [60](#)**) are **DENIED WITH LEAVE TO RENEW**. The parties shall meet and
22 confer and file a notice with the Court setting forth a hearing date and
23 briefing schedule for any anticipated motions for summary judgment **NO**
24 **LATER THAN April 29, 2011**.

25 8. Plaintiff's Second Motion to Compel Production of Documents from
26 Defendant Suttell & Hammer (Interrog. 13, and RFP 7, 23, & 38-41) (**ECF**

1 No. [216](#)) is GRANTED.

2 IT IS SO ORDERED. The District Court Executive is directed to enter
3 this Order and distribute copies to counsel.

4 DATED this 15th day of April 2011.

5
6 s/Edward F. Shea

7 EDWARD F. SHEA

8 United States District Judge

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